AUTHORITIES CITED

ANTAGONISTIC TO

HORACE BINNEY'S CONCLUSIONS

ON THE

WRIT OF HABEAS CORPUS,

BY TATLOW JACKSON.

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WRIT OF HABEAS CORPUS.

By TATLOW JACKSON.

Having carefully read Mr. Horace Binney's pamphlet, "The "Privilege of the Writ of Habeas Corpus under the Constitution," and conscientiously believing the doctrine therein inculcated to be of an anti-Republican tendency, and the conclusion—"The Presi- "dent being the properest and the safest depository of the power "(to suspend the Writ of Habeas Corpus) and being the only "power which can exercise it under real and effective responsi- "bilities to the people"—to be untrue, and not safe to a people whose Constitution, in its preamble, declares that it was ordained and established "in order to form a more perfect Union, establish "justice, (not despotism,) insure domestic tranquility, and (last "but not least) secure the blessings of liberty to ourselves and "our posterity"—I feel it to be a duty, notwithstanding the mis- conceptions that may be entertained as to the motive which prompts me, to make public the result of such investigations on the subject as my limited time has permitted me to make.

The Constitution, exclusive of its amendments, is divided into six Articles, of which the three latter relate to miscellaneous grants and restrictions; the third relates to the Judiciary; the second exclusively to the Executive; and the first to legislative powers and restrictions—commencing "Article I., Section 1. All legisla-

"tive powers herein granted shall be vested in a Congress of the "United States, which shall consist of a Senate and House of "Representatives." The following Sections of this Article relate to the composition, election and organization of Congress, until we come to Section 8, which commences: "Congress shall have "power," and proceeds to enumerate its objects. Section 9 of same Article I. follows, and commences by restricting Congress from prohibiting "the migration or importation of such persons "as any of the States now existing shall think proper to admit," prior to the year 1808, and continues in the following clause: "The privilege of the Writ of Habeas Corpus shall not be sus- "pended, unless when in cases of rebellion or invasion the public "safety may require it."

From the locality of the foregoing restriction, being in Article I.—from the nature and importance of the Writ, and the responsibility pertaining to a suspension thereof—it has ever, prior to the year 1861, been conceded that the right to judge of the existence of the contingency and exigency, and the power to withdraw from the Federal courts the authority to issue the writ, belonged to Congress.

The discovery that the right to suspend "the privilege of the "Writ of Habeas Corpus" pertained to the Federal Executive was reserved to His Excellency, President Lincoln; the task of defending the President's conclusion, to Attorney General Bates; and the honor of propping a weak argument with a name of legal and logical renown, to our fellow-citizen, Horace Binney. Knowing the high character and strict integrity of Mr. Binney, I may not apply to his effort the words Chief Justice Story used, in referring to an excuse advanced by the celebrated Blackstone regarding the cruelty of some English laws: "The meanest apolo- "gist of the worst enormities of a Roman Emperor could not have "shadowed out a defence more servile or more unworthy of the "dignity and spirit of a freeman;" but I may sincerely regret that Mr. Binney's logic has been employed in an endeavor to increase "the one man" power, by advocating a construction of the Constitution totally different from what it is patent was held by its creators and adopters. And to what good? Is not the present Executive supported in his administration by a Legislature more

sympathetic than had President Adams in 1798 and 1799? Those memorable years—whose gloom so strongly contrasted with the brightness of 1801—in which President Jefferson said in his inaugural, "Let us, then, fellow-citizens, unite with one heart and "one mind; let us restore to social intercourse that harmony and "affection without which even liberty and life itself are but dreary "things;" and continued, "If there be any among us who would "wish to dissolve this Union or to change its republican form, let "them stand undisturbed as monuments of the safety with which "error of opinion may be tolerated where reason is left free to "combat it."

But to return to the great Writ. President Madison, the father of the Constitution, in a speech in Congress in 1796, (see Annals first session, IV. Congress, page 776,) says: "But after all, what-"ever veneration might be entertained for the body of men who "framed our Constitution, the sense of that body could never be "regarded as the oracular guide in expounding the Constitution. "As the instrument came from them, it was nothing more than "the draft of a plan, nothing but a dead letter, until life and "validity were breathed into it by the voice of the people speak-"ing through the several State Conventions. If we were to look, "therefore, for the meaning of the instrument beyond the face of "the instrument, we must look for it, *not* in the General Conven-"tion which proposed the Constitution, but in the State Conven-"tions which accepted and ratified the Constitution."

Taking this dictum as a guide, let us refer to "Elliott's Debates "on the Federal Constitution," and discover, if possible, what construction was placed on this clause of Section 9, Article I., by the delegates of the people of the several States, convened to accept or reject the proposed Constitution. In vol. 1, page 361, we find the delegates of the people of the State of New York declare—"that every person restrained of his liberty is entitled to an in-"quiry into the lawfulness of such restraint; and to a removal "thereof if unlawful; and that such inquiry or removal ought "not to be denied or delayed except when on account of public "danger *the Congress* shall suspend the Writ of Habeas Corpus." On page 420 it will be found that Mr. Luther Martin, in referring to the power to suspend the Habeas Corpus, uses the words "Gene-

"ral Government" as relating to Congress. In vol. 2, page 122, "Debates in the Convention of the State of Massachusetts," Judge Sumner said "that this was a restriction, that the Writ of Habeas "Corpus should not be suspended except in cases of rebellion or "invasion"—"Congress have only power to suspend the privilege "to persons committed by their authority. A person committed "under the authority of the States will still have a right to the "Writ." And on page 147, Mr. Nason says, "the paragraph that "gives Congress power to suspend the Writ of Habeas Corpus, "claims a little attention." In same vol. 2, "Debates in the "Convention of the State of New York," on page 314, Mr. Williams refers to the Legislature thus—"It is true the 9th section "restrains their power with respect to certain objects;" and on page 373, it will be found that Mr. Tredwell uses the words "General Government" in referring to its power, as relating to Congress. In vol. 3, "Debates in the Convention of the Commonwealth of Virginia," page 414, Mr. Grayson remarked that "there were some negative clauses in the Constitution which re- "futed the doctrine of the other side; for instance, the second "clause of the ninth section, 'The privilege of the Writ of Habeas "'Corpus shall not be suspended unless when in cases of rebel- "'lion or invasion the public safety may require it,' and by the "last clause of same section, 'No title of nobility shall be granted "'by the United States.' Now if these restrictions had not been "inserted, he asked, whether Congress would not most clearly "have had a right to suspend that great and valuable Writ." And on page 424, Mr. Patrick Henry asks, "What will be the "result if Congress, in the course of their legislation, should do a "thing not restrained by the ninth section;" and Governor Randolph, in answering him, says, "He asks, where is the power to "which the prohibition of suspending the Habeas Corpus is an "exception? I contend that by virtue of the power given to Con- "gress to regulate courts, they could suspend the Writ of Habeas "Corpus—this is, therefore, an exception to that power." I find in other parts of these debates remarks, too voluminous to here introduce, which go to prove that the construction placed on this clause in the various Conventions was that it was a restriction on the power of Congress—not on that of the Executive.

In fact, were it not for this clause, Congress could suspend the privilege of the Writ of Habeas Corpus whether rebellion or invasion existed or no. I may add, that in perusing the debates in the several State Conventions, I have not found one authority to sustain the conclusion of Mr. Lincoln and Mr. Binney.

During the debates in Congress incidental to the famous Alien and Sedition laws of 1798, and the attempted suspension of the Writ of Habeas Corpus at the time of Burr's conspiracy, in 1807, frequent mention was made of the great Writ; and to show what was the universal construction placed on Section 9, Article I., I will quote from the remarks of some of the members.

In 1798, (see Annals V. Congress, 2d vol., page 2007,) Mr. Livingston, of New York, said: "Our Government, sir, is found-"ed on the establishment of those principles which constitute the "difference between a free Constitution and a despotic power; a "distribution of the Legislative, Executive and Judiciary powers "into several hands; a distribution strongly marked in the three "first and great divisions of the Constitution. By the first all "legislative power is given to Congress; the second vests all legis-"lative functions in the Executive, and the third declares that the "judicial powers shall be exercised by the Supreme Court."

Mr. Gallatin, Mr. Sewall and Mr. Bayard, will be found to refer to the suspension of the Writ of Habeas Corpus as being within the power of Congress under the contingencies provided.

In 1807, Mr. Varnum, of Massachusetts, said: (see Annals IX. Congress, second session, page 411,) "I consider the coun-"try, in a degree, in a state of insecurity; and if so, the power "is vested in the Congress of the United States, under the Con-"stitution, to suspend the Writ of Habeas Corpus."

And in the same Congress, Mr. Smilie, of Pennsylvania, made a speech replete with the understanding that the right to suspend the Writ lay in Congress.

Mr. Broom, of Delaware, said: (see page 503,) "Such is the "value of this privilege that even the highest legislative body of "the Union, the legitimate representatives of the nation, are not "entrusted with the guardianship of it, or suffered to lay their "hands upon it, unless when, in cases of extreme danger, the pub-"lic safety shall make it necessary."

And Mr. Eppes, of Virginia, (page 517,) said: "The Consti-"tution, by restricting the Legislature from suspending it except "when, in cases of rebellion or invasion, the public safety may "require a suspension."

And on page 546, Mr. Holland said: "This prohibition mani-"festly applies to the Legislature and not to persons in their in-"dividual capacity."

And on page 540, Mr. G. W. Campbell, after quoting the Habeas Corpus clause, said: "This provision evidently relates to "Congress, and was intended to prevent that body from suspend-"ing, by law, the Writ of Habeas Corpus, except in the cases "stated."

And on page 575, Mr. John Randolph says: "The Writ of "Habeas Corpus is the only writ sanctioned by the Constitution. "It is guarded from every approach except by the two houses of "Congress."

But why amass quotation on quotation? Not a member, so far as I can discover, construed the clause other than as the foregoing.

Let us now turn to the bills of rights attached to or contained in the Constitutions of most of the States: Our own, Pennsylvania, has this, "That no power of suspending laws shall be ex-"ercised unless by the Legislature or its authority." Massachusetts, Delaware and Vermont have similar clauses, while Virginia declares, "That all powers of suspending laws or the execution "of laws, by any authority, without consent of the representa-"tives of the people, is injurious to their rights, and ought not to "be exercised."

The same sentiment pervades the Constitutions of most of the other States.

Judge Reed, in his Pennsylvania Blackstone, in treating of the Writ of Habeas Corpus, quotes as above from the State Constitution, and evidently considers the Writ as an integral portion of law. The celebrated commentator, Story, and all compilers and writers on the Constitution that have come under my observation, reason that Section 9 of Article I. is a restriction on the power of Congress. Moreover, whence did the Federal courts derive the power to issue this Writ? Was it not from an Act of the Congress of 1789? "Section 14. *And be it further enacted*, That all

"the before mentioned courts of the United States shall have "power to issue writs of Scire Facias, Habeas Corpus, and all "other writs not specially provided for by statute, which may be "necessary for the exercise of their respective jurisdictions, and "agreeable to the principles and usages of law; and that either "of the Justices of the Supreme Court, as well as Judges of the "District Courts, shall have power to grant writs of Habeas Cor- "pus, for the purpose of an inquiry into the cause of commitment, "*provided*, That Writs of Habeas Corpus shall in no case extend "to prisoners in goal, unless where they are in custody, under or "by color of the authority of the United States, or are commit- "ted for trial before some court of the same, or are necessary to "be brought into court to testify."

Mr. Binney says, "While rebellion lasts and the public safety "is in danger, the power is indispensable; and the Constitution "supplies it for the whole of the occasion." Granted that the Constitution supplies the power—but it is not in clause 2 of Section 9 of Article I. that it does so. This clause is a restriction—not a grant. The contingencies of "rebellion," "invasion" and "public safety" requiring—existing—the restriction on the general legislative control of Congress over the Federal courts is removed, and Congress, falling back on this general power. can suspend the right of these courts to issue the Writ.

When the storm of passion which now pervades the public mind shall have passed away, I think that most of those who now applaud Mr. Binney's work will reject and contemn the conclusions of it.

Such trust of power to one man is antagonistic to all republican teachings. Let the Federal Government do all it can to secure success in the present awful crisis—but for the sake of what is infinitely more dear than Union—liberty—let all acts emanate from the proper department. Or, when imperious necessity commands, let the department usurping do as did General Jackson at New Orleans—take the responsibility; and hope that, in the attainment of the end, the people will pardon or justify the means. But leave intact the Constitution as our fathers construed and adopted it.

Mr. Binney's book, with the quotation in it from "Lieber," is an argument favorable to despotic power, and will ultimately, I

trust, be as little relished by the American public as was the argument "that the obligations imposed on the President to see the "laws faithfully executed implies a power to forbid their execu-"tion," by the Court in the case of Kendall *vs.* United States, 12 Peters, 524.

To conclude, I hold that, under shelter of the foregoing quotations, it is not assumption in me to combat Mr. Binney's conclusions, nor unreasonable to persist in the belief—

First. That to the Congress of the United States pertains the right to suspend the privilege of the Writ of Habeas Corpus, whensoever, in cases of rebellion or invasion, it may deem the public safety requires such action.

Second. That the power of Congress therein relates only to such cases as fall within the jurisdiction of the Federals courts.

Third. That the President has no official right to suspend the great Writ, and that the assumption and exercise of such power is tyrannous in its nature and destructive of constitutional liberty.

Fourth. That it is doubtful whether Congress can or cannot authorize the President to suspend the Writ in optional cases. Can they authorize him to legislate? It seems to me like the delegation of trustee powers.